



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 25, 1996

Ms. Lydia Gonzalez Gromatzky  
Acting Legal Division Director  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR96-2214

Dear Ms. Gromatzky:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32579.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for "the complete contract for the United Creosoting Superfund Site" and "the CF Systems proposal." You sought an open records decision from this office in connection with this request pursuant to section 552.305 of the Government Code and submitted a portion of the proposal to this office as "representative" of the proposal as a whole. Consequently, this office notified representatives of CF Systems that we received your request for an open records decision regarding the requested information. In our letter to CF Systems, this office requested an explanation as to why the requested information was excepted from public disclosure.

A representative of CF Systems timely responded to our notification and informed this office that there was no objection to the release of the requested contract. The commission therefore must release this document in its entirety. CF Systems contends, however, that its proposal to the commission "contains abundant information regarding plant design and layout, consumable materials, manpower requirements, and utility requirements which we regard as trade secrets," and seeks to have the entire proposal withheld from public disclosure pursuant to section 552.110 of the Government Code.

Section 552.110 of the Government Code excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. CF Systems has argued only that the information at issue should be withheld as trade secrets.

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). In this instance CF Systems has not demonstrated how the six factors apply to the information at issue. Consequently, we have no basis for applying the trade secret branch of section 552.110 to this information. *See* Open Records Decision No. 552 (1990). Because CF Systems has not demonstrated to this office that the requested information should be withheld under section 552.110, the commission should release the proposal at this time.

We are issuing this ruling based on the information and arguments provided at the time you sought a request for a ruling from this office. This file may contain "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision" encompassed by section 552.110 of the Government Code. In February, 1996, this office issued Open Records Decision No. 639 (1996), in which this office overruled the test set out in Open Records Decision No. 592 (1991) for this type of information and adopted the test federal courts have used when interpreting exemption 4 to the federal Freedom of Information Act. As section 552.110 is designed to protect third party interests, a claim under this exception may overcome the conclusion that this type of information should be released to the public. *See* Open Records Decision No. 552 (1990). However, the commission may not withhold this information without a ruling from this office. If you have any questions regarding this letter, please contact this office.

Yours very truly,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/RWP/rho

Ref.: ID# 32579

Enclosures: Submitted documents

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